NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Tuesday, February 20, 1996

(R-2125)
202/273-1991

IN HONOR OF THE 50TH ANNIVERSARY OF THE CREATION OF THE JAPAN LABOR RELATIONS COMMISSION (JLRC)

"CURRENT DIRECTIONS OF LABOR LAW IN THE UNITED STATES: SOME COMPARATIVE REFLECTIONS"

Delivered by:

William B. Gould IV
Chairman
National Labor Relations Board

February 20, 1996
The Japan Institute of Labour
Tokyo, Japan

Thank you! Good afternoon, Dr. Miura, Dr. Hanami, distinguished guests, ladies and gentlemen

It is a great honor for me to participate in this meeting. My first visit to Japan was in 1975 when I was greeted warmly by Professor Kichiemon Ishikawa and his graduate student Akira Okuyama of the University of Tokyo Law faculty. I returned to your country the next year and on five subsequent occasions to teach and complete my comparative studies of Japanese and American labor law which resulted in the publication of my book, Japan's Reshaping of American Labor Law. While in Japan, I frequently visited the offices and hearings of the Japanese (as well as local) Labor Relations Commission -- or, as Americans would say, the Japanese NLRB.

During the course of my visits I enjoyed the friendship of and appreciated the great assistance I received from Professor Hanami and Professor Koichiro Yamaguchi of Sophia Law School, Professor Yasuhiko Matsuda of the Yokohama National University, Professor Eiji Takemae of Tokyo Keizai University and many other scholars as well as union and management officials. All of them and others from Japan have visited with me at Stanford Law School So you can see why it is a great pleasure for me to enjoy the opportunity to return to Japan to see my many good friends and colleagues here and to learn first-hand about recent developments in the field of labor-management relations in your great country from which unions and management in the U.S. have learned so much.

My topic is recent labor law directions and developments in my own country, with some reference to Japan In 1995 we celebrated the sixtieth anniversary of the National Labor Relations Board and of the Wagner Act which established our agency and guaranteed the right of workers to organize and bargain collectively over wages, hours and working conditions should they choose to do so.

Our sixtieth anniversary year was a time of crisis and change in our government, in labor-management relations, and in the National Labor Relations Board. The New Deal programs of Franklin D. Roosevelt, the New Frontier programs of John F. Kennedy and the Great Society legislation of Lyndon B. Johnson were and continue to be under siege in the Congress. Because of the nature of its enforcement role in labor-management relations, the National Labor Relations Board has been the target of criticism by both employers and unions since its inception The attacks in 1995 and this year though are the most severe since the turbulent 1930s

Our small agency has been swept up in the dispute between the Democratic Clinton Administration and the Republican-controlled Congress over the federal budget, and over the more fundamental issue of the role of the federal government in society--which remains unresolved and is the subject of debate in this year's Presidential election.

The House of Representatives voted last July to cut the NLRB's budget by 30 percent along with sizable cuts in many other regulatory agencies and federal programs--including those which affect health care for senior citizens, the education and welfare of children, occupational safety and health, and environmental protection. The Senate

committee responsible for the NLRB's budget sensibly voted to keep our funding at the same level in 1996 as in 1995, but the full Senate has not voted as yet President Clinton proposed a small increase for the NLRB which would have permitted the agency to complete the updating of our computer system and hire 62 employees needed in our field offices to avoid delays in case processing. Thus, as I speak, our budget has not been determined. Where we will end up is anyone's guess. For now we are operating under a continuing resolution, a temporary spending bill, through March 15

The debate on the NLRB budget is really an attack on an employee's basic rights to organize and bargain collectively, which in my view is a critical underpinning of American democracy and indeed of all democratic industrial societies If enacted into law, the House bill would undermine orderly and balanced procedures which are attuned to the competing interests of labor and management. The National Labor Relations Board protects these rights and sets the ground rules which make them work. Free collective bargaining is more vulnerable today in the U.S at the present time than at any time since the Wagner Act was passed in 1935

Let me make unmistakably clear what is at stake A vacuum in collective representation vacated by unions imperils democracy in the workplace--and in society generally--and is contributing to stagnation in real wages and a growing gap between the "haves" (the rich) and the "have nots" (the poor and ordinary working people) as traditional union jobs disappear from the U S economy

Besides the political threats to the enforcement of the statute by the NLRB, the viability of the labor relations framework is threatened by the corrosive phenomenon of striker replacements In 1938, the U S Supreme Court ruled in MacKay[1] that an employer may hire permanent replacements for employees who are striking over economic issues in collective bargaining This anomalous ruling, which weakened the law's protection of the worker's right to strike, lay dormant for decades because even though employers had the right to hire permanent replacements for striking workers, they infrequently used it. However, in the past 15 years or so, permanent replacement of strikers--either the threat or actual use of the tactic--has gained public legitimacy and become a weapon of first resort in the arsenal of a growing number of employers. Unions have reached the point where they rarely use the strike weapon. For example, in the entire U S. last year only 32 strikes were reported at employers with 1,000 or more employees, the lowest level since World War II As a result, the viability of collective bargaining is undermined as is the delicate balance between labor and management that is essential for our labor relations system to work.

One of the most contentious issues being pressed by the Republicans in the Congress is their effort to overturn President Clinton's 1995 Executive Order prohibiting the use of permanent striker replacements by employers who have contracts with the federal government. Recently, the U.S. Court of Appeals for the District of Columbia

---

[1] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938).

declared the President's order to be unlawful,[2] but the Administration is considering whether or not to challenge the ruling through a petition for rehearing or appeal to the Supreme Court. The President believes, as I do, that the right to strike-- without the fear of being permanently replaced--is a fundamental democratic right that must be restored.

Union membership in the private sector in the United States has declined from a high of 33.2 percent in 1955 to 10 4 percent today. Weakness in the law is only one of the factors contributing to this decline, a point I have made in my writings many times over the years Among the numerous other factors, in my view, are the following: (1) global competition and corporate relocation to other countries--resulting in large-scale layoffs and growing economic insecurity for workers; (2) deregulation in traditional union-stronghold industries such as trucking, railroads and airlines; (3) the rising number of illegal immigrant workers who, fearing deportation, are afraid to protest substandard employment conditions, let alone become involved in a union organizing campaign; (4) the rapidly expanding contingent workforce, composed of mostly low-paid temporary and part-time employees who have proven to be difficult for unions to organize; (5) a shift in the composition of the workforce from the manufacturing sector to the service sector which included many occupations that have traditionally not been highly unionized and many new largely white collar and technical occupations which unions have had little success in organizing; (6) union organizing lethargy and lack of imagination in adopting new ways of serving potential members; and (7) the increasingly sophisticated labor relations practices of corporations

The recent change in leadership of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) suggests the possibility of greatly increased resources and more aggressive tactics being devoted to union organizing efforts. The new AFL-CI0 president, John Sweeney, had headed the Service Employees International Union, the fastest growing major union in the United States. During the course of the federation's election campaign a clear consensus developed among all AFL-CIO unions and the candidates that much greater financial resources and energy and imagination had to be devoted to organizing new union members. Only time will tell whether the initiatives planned by the new leadership will reverse the decline of the labor movement.

Another trend which has been the subject of much commentary in the past several years and which is related to the work of the NLRB in implementing the right to organize and bargain collectively is the stagnation of real wages in the U.S. and growing gap in incomes between the few at the top of the income distribution and the rest of the workforce The incomes of the top one percent more than doubled in real terms between 1979 and 1989, a period during which the median income was roughly stable and in which the bottom 20 percent of earners saw their incomes actually fall by 10 percent.[3] Corporate executive compensation has skyrocketed in recent years. According to compensation consultant, Graef Crystal, the typical head of a large American corporation earned 35

---

[2] Chamber of Commerce v. Reich, 151 LRRM 2353 (D.C. Cir., 1996).
[3] Frank and Cook, The Winner Take All Society, page 5.

times the earnings of an average manufacturing worker in 1974 and today earns 120 times the earnings of the same manufacturing worker and about 150 times that of the combined average of manufacturing and service industry workers [4] As I observed in my book Japan's Reshaping of American Labor Law, this ratio is much higher than is the custom in Japanese industry and may add to American industry's difficulty in matching the Japanese level of community of interest and harmony between labor and management

The causes of the growing income disparity are related to the decline in unionization. They include the increasingly global marketplace, the decline in traditionally unionized factory jobs, slower productivity improvement despite restructuring and downsizing of many major corporations, the rapidly increasing use of contingent workers who are hard to unionize despite their low wages and meager benefits, and the need for greater investments in human capital in the form of improved basic education in math and science and continuing training and education throughout each worker's career. Some of the current disputes in the Congress are over Clinton Administration initiatives in this area which the conservatives do not feel are a proper role for government In a sense, the role of the National Labor Relations Board also is related to the issue of income distribution in that the agency provides the mechanisms (i.e conducting secret ballot representation elections and refereeing the collective bargaining process) through which issues of fair wages and benefits and productivity improvements may be addressed by the parties themselves

Let me now turn to Japan's influence on U S labor-management relations In the 1960s and 1970s, some important U S industry sectors--such as the automobile industry--were characterized by lack of competition, adversarial labor relations, and low product quality and productivity Then overseas imports brought increased competition in the form of higher quality products and more productive organizational structures and policies

American companies in the 1970s began to adopt many of the methods developed by Japanese competitors Edward Deming was rediscovered in America, and visits by groups of U S managers and trade unionists to Japan to study production methods, organization structures, labor relations and employee policies became very common.

About this time SONY, Honda, Nissan and other Japanese manufacturers established plants in the U S Toyota and General Motors established NUMMI, a joint venture which re-opened a closed GM assembly plant in Fremont, California, down the road a few miles from Stanford University where I was teaching at the time The project was a quick, inexpensive way for Toyota to gain a foothold in the U.S. and was an opportunity for General Motors and the United Automobile Workers to have access to a convenient "learning laboratory" on Toyota's vaunted production system--including its approach to achieving cooperative employee and union relations

[4] Ibid., page 68.

I have visited the plant many times and can attest first-hand to its well documented successful practices. With much the same workforce from the previous GM plant and with the same union and most of the same union officials, a great transformation was achieved at NUMMI in comparison to the results achieved at the GM Fremont plant. Labor-management relations improved, written grievances were reduced to a tiny fraction of the previous level, employee attendance improved substantially, and productivity and product quality levels were quickly reached that were close if not equal to those at Toyota's Corolla plant in Japan.

General Motors set up an office near the plant which collected and disseminated throughout the company information on the "secrets" of the Toyota production system and scheduled as many management and union visitors from GM plants as NUMMI could tolerate without unduly disrupting its plant operations. Much was learned by GM management and union officials through this process. However, like the grapes of good wine, they found that the seeds did not always travel well and take root in existing factories with a long history of operating in a more traditional hierarchical, compartmentalized, adversarial fashion. The difficult transformation process continues to this day throughout the U S automobile industry, and it has begun to spread as well to Europe and other parts of the world.

Later, SATURN Corp was established by General Motors and agreement reached with the UAW to build a cooperative relationship with a labor agreement totally separate from existing national and plant union agreements. The SATURN experiment--which incorporated a cooperative relationship between the union and management in all aspects of the business from plant and product design, employee policies, marketing, finance and strategic planning--is continuing to this day and has succeeded in producing a successful, high quality product as well as a uniquely cooperative relationship among employees, union and management modelled and adapted in large part from lessons from Japan.

These developments in labor-management relations drawn from Japan led to a concern for the parties at interest under U.S. labor law over the status and legality of the various employee involvement efforts which had become increasingly common in American industry Since its passage in 1935, the NLRA has contained a provision designed to prevent employers from creating and dominating sham labor organizations, the company unions which were instigated in the 1930s in an effort to forestall authentic, independent unionization efforts by their employees. Over the years there have been several cases in which charges of violations of this provision have been brought against employers and upheld by the NLRB and the courts. The current debate is over how or whether the law can and should be amended so that it will not discourage legitimate employee involvement in efforts to improve productivity and product quality, teamwork, etc , without opening the door to the creation and domination of sham unions by anti-union employers.

The Republicans in Congress have proposed a new law called the TEAM ACT which, in the process of encouraging productivity and quality teams, would, in effect nullify the National Labor Relations Act's prohibition of the practice of creating,

dominating and dealing with sham or company unions President Clinton has announced that he would veto the TEAM Act if it is passed. And its proponents do not appear to have the two-thirds majority vote required to over-ride his veto Thus on this bill as well as others proposed by the Clinton Administration there is currently a stalemate on labor legislation. My view on this issue is that the law should not discourage labor-management cooperation designed to improve quality and productivity but not permit "sham unions" dominated by employers.

Turning back to the NLRB, my primary goal since being appointed Chairman has been to both increase the Agency's overall effectiveness in administering the National Labor Relations Act as well as to reestablish the Board's credibility as an impartial arbiter which is fair to all parties

Immediately after my appointment was confirmed by the U S Senate, upon my recommendation, the Board appointed two private sector advisory panels composed of leading labor lawyers, 25 who represent unions and 25 who represent employers. The appointees came from all geographic areas and industry sectors They agreed to serve without pay or reimbursement by the government for their expenses in attending meetings in Washington twice yearly These panels have proved to be an invaluable resource and sounding board for the NLRB Board and General Counsel.

One of the differences between industrial relations in the U S and Japan which I found so striking during my studies here is the greater use here of informal dispute resolution processes and the less frequent use of litigation Drawing on my research in Japan and the ideas set forth in my book comparing Japan and America, the first innovation which I proposed for the NLRB was designed to decrease the need for time consuming and costly litigation by instituting new procedures for the Board's Administrative Law Judges. Our experience has been that a high percentage of voluntary settlements, more than 90 percent, are reached early in the process, but once the cases are scheduled for formal hearings before Administrative Law Judges the rate of settlement has historically been quite low The time and cost of ALJ hearings and appeals to the Board and courts are high, so substantial savings result from each settlement that is reached short of a hearing

To encourage more settlements at the Administrative Law Judge level of our procedures the Board established one-year trial project embodying several innovations. First, appointing, in appropriate cases, "settlement judges" who engage the parties in voluntary informal efforts to resolve the issues short of a formal hearing If they fail, the case is assigned to another judge for a formal hearing. Second, the judges, in appropriate simple cases, are encouraged to dispense with written briefs and issue summary bench decisions at the conclusion of the hearing. As a result of highly favorable experience in resolving cases informally during the one-year trial project, the Board voted this month to make the new procedures permanent effective March 1, 1996.

Another approach I have advocated to reduce needless and costly litigation involves the use of the Board's rulemaking powers to deal with recurring issues on the

basis of clearly defined rules rather than on a case-by-case basis. One such rule posted recently by the Board for public comment involves the conditions under which a single plant or other business location of an employer's multiple work site may be deemed appropriate for a separate representation election and bargaining unit. The Board has litigated hundreds of cases on this issue over the years, and, I believe, can avoid much litigation in the future by adopting a simple, clear rule specifying the requirements for a single bargaining unit in terms of the number of employees at the site, the distance between the site and other work sites of the same employer, and supervisory arrangements.

Another change advanced under my tenure has been increased use of the Board's power to seek injunctive relief in cases where an employer's or a union's misconduct is so serious that irreparable damage is likely to result in the absence of a court injunction providing immediate relief. Examples of where injunctions are appropriate are where a union was engaging in picket line violence or where an employer dismissed union organizers to intimidate employees voting in a union representation election. Last year injunctive relief obtained by the Board against the Major League Baseball owners association brought about an end to the players strike and saved the 1995 baseball season. The prospect of facing a prompt injunction deters employers and unions from committing violations which, in the absence of an injunction, would be remedied only months later through normal processes.

During the debate of two decades ago, opponents of labor law reform pointed to the availability of Section 10(j) as a basis for their conclusion that the statute should not be changed In recent testimony before a U.S Senate Subcommittee AFL-CIO Secretary-Treasurer Richard Trumka responded to critics of the Board's increased use of injunctions by pointing to previous testimony of the National Association of Manufacturers that "speeding up NLRB processes for handling of 10(j) (injunction) requests may be the answer to those who clamor for expeditious action under the Act."

At the five-member Board level we have taken steps to simplify and speed up the case decision-making process. Last year we adopted a new "speed team" procedure which has greatly speeded up decisions in the simpler and less controversial cases. At the end of 1995 the Board's case inventory was the lowest it has been in many years.

A problem that has plagued the NLRB in recent years is that the appointment and confirmation process for filling vacancies on the five-member, Presidentially-appointed Board has become increasingly politicized as partisans from the extremes of each political party attempt to gain an advantage for their constituents Because of the frequent difficulty of obtaining confirmation by the Senate controlled by the opposite party from the President, on several occasions vacancies on the Board have gone unfilled for many months and undermined the decision-making processes. The desire of an incumbent Board member to be reappointed to a second five-year term also has adversely affected the Board's deliberations For these reasons I have advocated increasing the length of Board members' terms from five years to a longer period, perhaps seven years with a limit of a single term Also, I believe allowing an incumbent to continue to serve beyond the

end of his or her specified term until the appointment and confirmation of a successor would be desirable. This would end the problem of long vacancies on the Board Currently the Board is operating with only four members because of the difficulty of getting nominees confirmed by the Senate, a feat which is especially difficult in an election year These are matters that only Congress can rectify

I want to conclude by reiterating what an honor and a pleasure it is for me to return once more to Japan to see my good friends and share my views with you today. My contact with Japan has been one of the most exhilarating experiences of my life! I look forward to future contact and association between the American and Japanese Labor Boards! And I look forward to continued peace and friendship between Japan and the U.S.!

# # #